

No. 12-57302

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CINDY LEE GARCIA, Plaintiff-Appellant

v.

GOOGLE, INC., YOUTUBE LLC, et al., Defendants-Appellees, and
NAKOULA BASSELEY NAKOULA, a.k.a. Sam Bacile, et al., Defendants.

On Appeal from the United States District Court
for the Central District of California
D.C. No. 2:12-cv-08315-MWF-VBK

**APPELLANT CINDY LEE GARCIA'S OPPOSITION TO GOOGLE,
INC. AND YOUTUBE, LLC'S EMERGENCY MOTION FOR
ADMINISTRATIVE STAY**

FILED UNDER SEAL

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CIRCUIT RULE 27-3 CERTIFICATION

Pursuant to Ninth Circuit Rule 27-3, counsel for Appellant Cindy Garcia state:

1. The telephone numbers, email addresses and office addresses for the attorneys for the parties are as set forth in the moving papers.
2. As this Court is aware, legally speaking, this case presents a garden-variety copyright infringement claim by actress Cindy Lee Garcia, who holds a copyright in a film performance that she gave in 2011, against the director of the film—who dubbed over Ms. Garcia’s performance so as to give the impression that her performance actually constituted grotesque anti-Islamic hate speech. Google and YouTube are defendants because despite that fact that they received multiple DMCA takedown notices informing them of Ms. Garcia’s copyright, they continued to broadcast the infringing work to a worldwide audience. The reason that this case is extraordinary, then, are not the relatively simple legal issues involved: it is the consequences. YouTube and Google’s decision to repeatedly infringe Ms. Garcia’s copyright and continue to broadcast racist propaganda resulted in worldwide rioting and, more pertinent to the issues before this Court, the entry of a *fatwa* against Ms. Garcia, which has left her in credible fear for

her life and caused her to lose her home, her job, her personal safety and well-being, and her relationships with her friends and family.

3. On February 19, 2014, this Court issued an order (the “Order”) requiring Google Inc. and YouTube LLC (“Appellees/Defendants”) to remove “Innocence of Muslims” from their platforms and prevent future uploads. In its entirety, the Order states in no uncertain terms that:

Google, Inc. shall take down all copies of “Innocence of Muslims” from YouTube.com and from any other platforms under Google’s control, and take all reasonable steps to prevent further uploads of “Innocence of Muslims” to those platforms. ***Google shall comply with this order within twenty-four hours of the issuance thereof.***

Neither the parties nor counsel shall disclose this order, except as necessary to the takedown process, until the opinion in this case issues. This order will remain in effect until such time as the district court enters a preliminary injunction consistent with our opinion.

(Emphasis added.) As of the time of the filing of this Opposition, the Court has not yet issued its opinion in this case and therefore, one of the parties possess any information about the legal bases for the Court’s decision.

4. On February 20, 2014, Defendants filed an Emergency Motion Under Circuit Rule 27-3 for an Administrative Stay Pending Their Petition for Rehearing En Banc (Under Seal), along with an accompanying motion to file the Motion under seal. Plaintiff opposes the Motion.

OPPOSITION TO MOTION

Appellant Cindy Lee Garcia (“Appellant” or “Garcia”) opposes the Motion for an immediate administrative stay on the following grounds:

1. The Motion is Premature. Because the Court has not yet issued an opinion in this case, the Motion is premature. Google and YouTube are not privy to the Court’s recitation of the factual and procedural history, legal reasoning, or citation to legal authority and cannot, therefore, presume to know the bases on which the Court issued its immediate takedown order—much less criticize the Court’s decision.

2. The First Amendment Rights Of Appellant Trump Those Asserted by Appellees/Defendants. Google and YouTube claim that this Court’s order that they stop giving Ms. Garcia the “runaround” and immediately take down the infringing work intrudes on their First Amendment and due process rights. (Appellees/Defendants’ Motion, ¶ 3.) Google and YouTube are wrong. First and foremost, Google and YouTube are wrong because under well-established Supreme Court precedent, *there is no First Amendment right to commit copyright infringement*, but that is exactly what Google and YouTube are doing. Specifically, by continuing to disseminate the altered performance, Google and YouTube are guilty of secondary copyright infringement. Cohen’s v. Cowles Media Co., 501 U.S.

663 (1991) (“Notwithstanding the Federal Constitution’s First Amendment, the press—like others interest in publishing—may not publish copyrighted material without obeying the copyright laws.”). Second, Google and YouTube are wrong about “their” First Amendment rights because Google and YouTube *are not the authors* of “Innocence of Muslims”. Their role in this case is as a provider of a platform for Defendant Nakoula and his cronies to air *their* views—a platform that Google and YouTube provide because YouTube, which has an advertiser-supported business model, makes a great deal of money from controversial videos. Third, even if Google and YouTube were taking ownership of the ideas underlying “Innocence of Muslims” for the purpose of asserting a First Amendment claim, that claim would still fail. Defendants’ First Amendment rights, if any, are negligible when compared to Ms. Garcia’s First Amendment right not to be forced to be the mouthpiece for others’ speech. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). And, as in this case, when the film’s producer literally put words into Ms. Garcia’s mouth and used her as a puppet to send *his* message (one that she strongly disapproves), that is exactly what happened.

3. The Court Has Already Issued an Order. Google and YouTube also argue that because the Court has not yet filed its opinion, they are

precluded from being able to explain to the world why it is removing the film from the public eye. (Defendants’ Motion, ¶ 3.) This is a red herring unworthy of the Court’s consideration. Google and YouTube provide no explanation of why they believe themselves to be under any obligation to tell anyone why they remove anything from their own websites. Rather, their *true* obligation is to obey the orders of this Court, including the one issued on February 19. Despite the possibility that the Court will issue a more detailed order, there is absolutely no authority for the proposition—and indeed, Google and YouTube provide none—that it is somehow “optional” for the parties to obey a Court order that has been issued in a summary fashion.

4. Scope of the Order. Google and YouTube next complain that the scope of the order is overbroad in that it covers not only the infringing work in its entirety, but also uploads onto various platforms under their control that were not specifically identified in Garcia’s many ignored DMCA takedown order requests. (Appellees/Defendants’ Motion, ¶ 3.) Given the state of technology today, a YouTube user determined to post “Innocence of Muslims” could simply keep reposting the work again and again, leaving Appellant, and many other similarly situated duped actors, in a situation that would require repeated lawsuits arising out of every new

upload and publication. In light of the reality of current technology, the Order therefore is appropriate and sensible in its scope. Any further analysis of the scope of the Order, however, would be highly inappropriate, given that none of the parties have yet seen the full opinion.

5. Google and YouTube Are Capable of Complying with the Order. Next, Google and YouTube—two of the largest, most technically sophisticated Internet companies in the world, represented by an army of lawyers from some of the largest, most sophisticated, and most powerful law firms in the country—claim helplessness to “understand how to fully comply with the Order” and offer only to “try” to obey this Court’s clear directive. (Appellees/Defendants’ Motion, ¶ 3.) However, by the 24-hour deadline, Google and YouTube not only had *not* complied with the Order, it appears that they made no genuine effort to do so, particularly in light of the fact that the companies almost certainly employ numerous technical staffers capable of doing the job. Indeed, by the time the deadline had passed, Google and YouTube had not even taken down the video initially published by Nakoula (aka “Sam Bacile”) and/or his colleagues, the location of which was specifically provided in the initial DMCA takedown notice. Screenshots taken overnight of YouTube show that Google and YouTube first waited until the Court’s deadline passed, then removed only some copies of the

infringing work, while leaving up thumbnails of their contents. These partial takedowns did not take place until after the expiration of the 24-hour period, when counsel for Appellant confronted counsel for Google and YouTube, explaining that Appellees were in contempt of this Court and demanding that Google and YouTube comply with the Order. Counsel also pointed out that Google and YouTube themselves had announced on several occasions that they had made the infringing work unavailable in various countries around the world, and therefore, it is unlikely that they are unable to comply with the Order. (See Declaration of M. Cris Armenta & Exhibits A-B.)

6. Google and YouTube Cannot Fulfill the Four Prongs of the Stay Test. First, Google and YouTube cannot satisfy the first prong of the stay standard, claiming that the order is wrong on its merits, because the opinion has not yet issued. The fact that they do not like the result does not equate to the order being wrong on the merits. Second, Google and YouTube will suffer no irreparable harm. The film trailer is *not* Google and YouTube's speech. The lost advertising revenues that may result from this Court's order is not equal to irreparable harm. Moreover, the First Amendment does not permit copyright infringement (if that is the basis of the Court's forthcoming opinion), and thus Google and YouTube will not suffer an injury to their First Amendment rights. Third, Appellant will be

harm if a stay is granted. Now that the Court has acted, as soon as the order or opinion is available to the public, Appellant will finally be free from the fatwa and terror she has endured since a fatwa was issued against her. Fourth, the public does not have an interest in having the film trailer published such that Appellee's copyright interests are infringed or she is continued to be placed in grave danger. Nothing in the takedown order stops the public from continuing to freely discuss the role that the film trailer took in the international stage following the events in Benghazi.

The motion for stay should be denied.

Respectfully Submitted,

/s/ M. Cris Armenta
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DECLARATION OF M. CRIS ARMENTA

I, M. Cris Armenta, declare:

1. I am an attorney admitted to practice before this Court, and a principal of The Armenta Law Firm APC. I am counsel of record to Appellant and Plaintiff Cindy Lee Garcia in this matter pending before this Court. I make this declaration based on my own personal knowledge. If called as a witness, I could and would testify competently as follows:

2. The parties received the Order of the Court received on 5:46 p.m. (Pacific Standard Time), on February 19, 2014. The 24-hour deadline set forth by the Court expired on February 20, 2014 at 5:46 p.m. (Pacific Standard Time). At 5:46 p.m., I logged onto www.YouTube.com and was able to find and view “Innocence of Muslims,” including a performance by my client, Garcia. I continued to take screenshots and play various uploaded copies of “Innocence of Muslims.” I checked until 7:59 p.m., at which time, the clips were still playable and viewable.

2. Upon receipt of the Motion of Appellees and the realization that YouTube had not complied with the Order and taken down the clips, I wrote to counsel for Appellees. A true and correct copy of our email correspondence is attached hereto as Exhibit A.

3. Today, a search for “Innocence of Muslims” clips, based only on very brief searches conducted by lawyers and not IT experts or personnel shows that the thumbnails for the various clips are still available on www.youtube.com, but clips are not playable and take the viewer to a page showing the clip has been disabled. A page showing the thumbnails and a page showing what the user sees when attempting to play the clips, which I was able to locate using my own, non-technical computer skills, are attached

hereto as Exhibit B.

I declare under the penalty of perjury under the laws of the United States of America that the forgoing is true and correct and that I executed this Declaration in Bozeman, Montana on February 21, 2014.

/s/ M. Cris Armenta

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2014, I served the foregoing Opposition by email on the following:

Neal Kumar Katyal – neal.katyal@hoganlovells.com

Timothy Alger - Talger@perkinscoie.com

Sunita Bali – Sbali@perkinscoie.com

/s/ M. Cris Armenta

EXHIBIT A

Cris Armenta

From: Cris Armenta
Sent: Thursday, February 20, 2014 6:12 PM
To: 'Katyal, Neal K.'; Holly_Baldwin@ca9.uscourts.gov
Cc: talger@perkinscoie.com; Perella, Dominic F.; Marotta, Sean M.; Credence Sol (komenick@gmail.com)
Subject: RE: 12-57302 Cindy Garcia v. Google, Inc.

Dear Neal:

We have reviewed the emergency motion filed before the 9th Circuit and the ongoing failure to comply with the Court's order. Enclosed is a snippet from Wikipedia demonstrating Google's ability to moderate its content in various countries worldwide. Google has the ability to comply with the order right now.

"YouTube voluntarily blocked the video in Egypt and Libya and blocked the video in Indonesia, Saudi Arabia, Malaysia, India and Singapore due to local laws while Turkey, Brazil and Russia have initiated steps to get the video blocked.[69][70][71][72][73] Google, Inc., the owner of YouTube also blocked the video in Libya and Egypt citing "the very difficult situation" in those countries.[74] In September 2012 the Afghanistan, Bangladesh, Sudan and Pakistani governments blocked YouTube for not removing the video, the website will remain suspended until the film is removed.[75][76][77] Government authorities in Chechnya and Daghestan have issued orders to internet providers to block YouTube and Iran has announced that it is blocking Google and Gmail.[78][79][80] Google has also agreed to block the anti Islam movie in Jordan.[77]"

-----Original Message-----

From: Katyal, Neal K. [<mailto:neal.katyal@hoganlovells.com>]
Sent: Thursday, February 20, 2014 5:44 PM
To: [Holly Baldwin@ca9.uscourts.gov](mailto:Holly_Baldwin@ca9.uscourts.gov)
Cc: Cris Armenta; talger@perkinscoie.com; Perella, Dominic F.; Marotta, Sean M.
Subject: 12-57302 Cindy Garcia v. Google, Inc.

Dear Ms. Baldwin:

As we discussed, please find a Motion to File a Motion Under Seal, as well as a Motion for an Emergency Administrative Stay Pending the Filing of an En Banc Petition in the above captioned case.

Thank you,

Neal

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Cris Armenta

From: Katyal, Neal K. <neal.katyal@hoganlovells.com>
Sent: Thursday, February 20, 2014 6:22 PM
To: Cris Armenta
Cc: Holly_Baldwin@ca9.uscourts.gov; talger@perkinscoie.com; Perella, Dominic F.; Marotta, Sean M.
Subject: Re: 12-57302 Cindy Garcia v. Google, Inc.

Thanks for this. As we discussed, we have filed a stay of this order, and we furthermore do not believe we are in contempt.

Sent from my mobile.

> On Feb 20, 2014, at 8:54 PM, "Cris Armenta" <cris@crisarmenta.com> wrote:

>

> Dear Neal:

>

> It is now 5:51 p.m. and it appears that your client has refused and failed to comply with the valid order of the Ninth Circuit. Google and YouTube are now in contempt of Court. This is a demand that your clients immediately comply with the order of the Ninth Circuit. Even the video posted by Mr. Bacile is still up and Google and YouTube have had more than 24 hours to comply with the order.

>

>

>

> M. Cris Armenta

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> Los Angeles, California 90064

> Telephone: (310) 826-2826

> Facsimile: (310) 826-5456

> www.crisarmenta.com

>

>

>

> -----Original Message-----

> From: Katyal, Neal K. [<mailto:neal.katyal@hoganlovells.com>]

> Sent: Thursday, February 20, 2014 5:44 PM

> To: Holly_Baldwin@ca9.uscourts.gov

> Cc: Cris Armenta; talger@perkinscoie.com; Perella, Dominic F.; Marotta, Sean M.

> Subject: 12-57302 Cindy Garcia v. Google, Inc.

>

> Dear Ms. Baldwin:

>

> As we discussed, please find a Motion to File a Motion Under Seal, as well as a Motion for an Emergency Administrative Stay Pending the Filing of an En Banc Petition in the above captioned case.

>

> Thank you,

>

> Neal

>

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>

EXHIBIT B

http://www.youtube.com/results?search_sort=video_view_count&search_query=%22... 2/21/2014

▼ "innocence of muslims"

Upload

Sign in

This content is not available on this country domain due to a legal complaint. [Learn more.](#)

Sorry about that.



Innocence of Muslims movie trailer



StandUpAmericaNow · 121 videos



The Innocent Prophet - Must watch Muhammad Movie for
by HinduismIslam
53,308 views



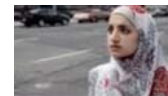
RE : Innocence of Muslims Full Movie - Prophet Mohammed
by TheMohammedFilms
223,888 views



Mixed Race Girl hates her Black side Funny Watch !!!
by moordenaar80
732,130 views



Prophet Muhammad (Peace Be Upon Him) | Mufti Menk
by 1IslamExplained
83,270 views



Change Of Heart - Muslim Short Film! تغيير القلب
by West Dawn Media
1,429,393 views



Born of Hope - Full Movie
by LOTR Prequels
26,602,540 views



A women loses the debate with a muslim women
by Sara Kurdy Abidatullah
3,720,106 views



Prophet Muhammad (a) The Most Influential Person in History.
by 1IslamExplained
724,565 views



The absolute truth about Muhammad in the bible: Rabbis
by Truth0will0prevail
637,171 views



MUSLIMS ATTACK CHRISTIANS IN AMERICA OVER SHARIA LAW
by HolyLandCrusaders
1,304,776 views

9:57

Obama Admits He Is A Muslim
by FeelTheChangeMedia
10,336,320 views

1:31:17

Muhammad The Last Prophet Movie [Full] - [Authentic | صحيح]
by Adam Riaz
649,869 views

4:00

Final Sermon of Prophet Muhammad a - Yusuf Islam
by ByChoiceMuslim
62,503 views

10:07

RE : Sam Bacile's The Muhammad Movie (Innocence of
by therationalfaith
681,578 views

5:18

A word to rioting Muslims
by Pat Condell
1,675,468 views

▼

"innocence of muslims"

by PEGADINHAS & ETC - THE ORIGINAL

2,008,386 views

Upload

Sign in

2:10

US Soldier Smack Down An Anti-Muslim Bigot [WWYD]

by ComeToTruth

6:22 168,452 views

3:09

BUKTI MUHAMMAD ADALAH NABI PALSU

by kasmawati sukasah

593,782 views

2:30:14

Owais Sahaba of Prophet Mohammed Islamic Movie Arabic

by Samandar Ali

10,278 views

8:17

'Innocence of Muslims' film spurs outrage across Arab

by RT America

305,900 views

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